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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES J. SCULLY, Warden, Green Haven Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Petitioner,

-v.-

CLAUDE HOLLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Magistrate, the District Court and the Court of Appeals were correct in concluding that Holland's right of confrontation was violated by the introduction at a joint trial of two co-defendants' post-arrest confessions which implicated Holland.

2. Whether the Court of Appeals correctly found that the Bruton error was not harmless where the prosecutor's summation repeatedly used the co-defendants' confessions as proof of Holland's guilt.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COUPT.

Counsel for respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's judgment in this case.

OPINIONS BELOW

Counsel for respondent adopts petitioner's statement.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent Claude Holland and codefendants Percy Moore and Richard Payton were convicted of felony murder by a jury in the Supreme Court of the State of New York, Queens County, on November 16, 1977. Another codefendant, Arthur Elliott, pleaded guilty to robbery in the first degree following pretrial hearings, and he testified for the State at Holland's trial. The prosecution's theory was that Holland, a New Yorker, was the mastermind of an armed robbery at a Queens check cashing establishment which was carried out by his friends from Chicago, Moore and Payton, and that Elliott was recruited to assist Moore and Payton in their flight from the scene of the crime. George Caccavalle, an off-duty New York City Transit patrolman and the owner of the check cashing business, was shot and killed by Moore during the robbery. Prior to trial, all the defendants moved for a severance based on Bruton v. United States, 391 U.S. 123 (1968) because they had each made post-arrest statements implicating their co-defendants. The motions were denied and the court refused to redact the statements.

The Murder

The testimony of various witnesses for the State* established the following series of events:

On May 25, 1976, Richard Payton traveled from Chicago to New York carrying one or two guns. Payton visited Holland's home; Percy Moore was there. On June 24, 1976, Caryl Thompson was robbed at gunpoint in the elevator of his Brooklyn apartment building. His wallet, containing his driver's license, was taken during the robbery. He identified Holland as one of the robbers.

According to Elliott, later that evening he went to Holland's house and entered into discussions with Holland, Payton, and Moore. Elliott testified that Holland asked him if he wanted to make some money and said "they were planning to rob the Van Dam check cashing store." Elliott testified he was supposed to pick up Payton and Moore the next morning at about 9:00 a.m. at a location in Queens. Holland was to be waiting in his own car in the same vicinity. There was some discussion about securing a rented "Goldie's" van by using a license that "they" had.

On the morning of June 25, 1976, Moore rented a red van from Goldie's Leasing Corporation. Moore used Thompson's driver's license and gave Holland's telephone number when renting the van.

At about 9:00 a.m. that same morning Moore was in the van outside the Van Dam check cashing facility in Queens. Another man was seen in the van but various witnesses, who knew and worked with Claude Holland, could not identify the other man.

George Caccavalle, an off-duty New York City Transit detective, arrived shortly thereafter with a cash payroll for the Van Dam facility in a canvas bag. A man fired three or four shots at

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*Testimony concerning the content of statements by Holland, Moore, and Payton will be discussed separately, infra.

Caccavalle, who fell to the ground. The gunman took the canvas money bag from Caccavalle and returned to the red Goldie's van, and drove away.

Elliott testified that he and Holland met Moore and Payton, who abandoned the van. They went to Elliott's mother-in-law's house, where they split up the money. Holland gave Elliott $3000 and each of the others received $10,000. Elliott saw Holland bring into the house a suitcase of clothing for Moore and Payton and was told that Holland drove them to the airport.

The following morning Elliott called Holland to report that he'd read in the newspapers that the man shot during the robbery was a police officer and was dying. Holland replied that he was sorry it "was a cop" because that would "bring a lot of heat." Caccavalle died that day of injuries resulting from three gunshot wounds.

The same morning Payton, who had been picked up the previous evening at Chicago's O'Hare Airport by his wife and brother, discussed the facts of this case with his wife, Shirley. Shirley then accompanied her husband as he made various bank deposits amounting to about $7,000. About a week or two later, Shirley Payton saw Claude Holland with another man and a woman in her Chicago apartment.

Holland's Statements

On the day of the robbery the police discovered the red Goldie's van in Queens. On June 28, 1976, Holland responded to a police request to answer questions and was asked why his telephone number appeared on the van's rental agreement. Holland said he didn't know how his number came to appear on the rental slip but that it was on his business card which he gave out to his customers; he produced a business card with his telephone number and gave it to the officer. Holland was questioned on different occasions by at least three police officers and detectives and steadfastly denied any involvement in the robbery.

On July 19, 1976, Shirley Payton contacted the New York City Police and gave a taped interview. Two days later Holland was advised of his rights and taken into custody. Holland told a detective that he was in Chicago the previous weekend. He said he knew about the Van Dam robbery because he had been at his house with "Richard and Percy," who were from Chicago, when they were planning the robbery. Holland said that he was not present when the robbery took place, but that he met Richard and Percy after the robbery and went to Elliott's mother-in-law's house on Washington Avenue in Brooklyn where they divided the money. Holland said that he then drove down Washington Avenue and threw the guns in a sewer in front of a church.

Later that night an Assistant District Attorney taped an interview with Holland. Holland indicated that his long time acquaintances, Payton and Moore, had come from Chicago to visit him about a month before the incident. Both men had been with Holland at the Van Dam on several Fridays when he went there to cash his check. Three or four weeks prior to the robbery Holland heard Payton and Moore planning to rob the Van Dam. On June 24, 1976, Payton and Moore told Holland that the robbery was to take place the following morning and that they planned to shoot the man carrying the money so that he would drop his gun. In response to Payton's inquiry about renting a van, Holland replied that he usually rented from Goldie's Leasing. Payton and Moore showed Holland a driver's license with the name "Carl" which Moore said they had taken from someone in Brooklyn and which they intended to use to rent the van. They also said that Elliott, who was present during this conversation, could more easily rent the van with the license because he looked a lot like the man in the photo on the identification. Elliott said "Well, maybe" in regard to the license, and also commented that the robbery involved a lot of money and that he needed some. Payton and

Moore indicated that they planned to drive to Washington Avenue after the robbery and to be taken to the airport.

At about 7:00 the next morning Holland dropped off Payton and Moore on 21st Street in Long Island City. Payton later told Holland that Moore panicked and fired a number of times because the initial shot he fired into the victim's shoulder didn't stop the man, who continued to raise his gun to retaliate. Holland called Payton on June 27 to tell him the man who died was a police officer. Payton told Holland they got about $33,000 in the robbery and gave Elliott $3,000 for picking them up on Washington Avenue in Brooklyn and driving them to the airport. On July 17 Holland requested money from Moore for a lawyer because he was being harassed by the police and had been good enough not to give out the information of which he had knowledge.

In later questioning, a detective told Holland he thought Holland lied during the taped interrogation. Holland dropped his head down and said, "Now I'm going to get involved" and admitted receiving a $10,000 share. Holland said he put the murder weapon and Caccavalle's gun into the money bags taken during the robbery and threw them all in a sewer on Washington Avenue in front of a church. The police found the murder weapon, Caccavalle's gun and the money bags in a sidewalk basin that was fed by the sewer in front of the church.

Elliott's Statements

Elliott was brought to the police station on July 21, 1976, at about the same time as Holland. He initially denied participation in the robbery and murder both before and after learning that Holland had implicated him. However, the next evening, he gave a taped statement and was subsequently arrested.

At trial Elliott was the only testifying witness who was personally present and could relate the events described above which occurred at Holland's house on the evening of June 24, at

the post-robbery rendezvous, and at Elliott's mother-in-law's house. During cross-examination at trial, Elliott revealed that he faced a 25-year to life sentence for the homicide but that by pleading to the lesser robbery offense he faced a substantially reduced sentence, beginning at zero. He admitted that he had initially lied to the authorities because it was convenient for him to do so, that he lies when it suits his purpose to do so, and that it now suited his purpose to lie in order to receive a much lower sentence.

Payton's and Moore's Statements

Payton and Moore were arrested in Chicago on July 21, 1976 and each made oral and transcribed statements to the police the following morning. In contrast to Holland's statement, which only admitted facilitation of the crime, both Payton and Moore portrayed Holland as the instigator. The statements were introduced into evidence over Holland's Bruton objection. The trial judge found the statements interlocking and instructed the jury to consider the statements only against the defendant who made the statement.

A. Payton's Statement

Payton said that about six weeks before the robbery Holland said he wanted Payton and Moore to come to New York baecause "he had something working" and they could "make a little money." Payton and Moore flew to New York with two revolvers packed in Payton's suitcases. They stayed at Holland's house when they arrived.

About two weeks before the robbery "Arthur [Elliott]" proposed that they hold up the owner of the Van Dam check cashing facility. On June 11, 1976, all four men went to the Van Dam with a rented Pepsi van, but Holland called off the planned robbery because the man with the money was carrying a gun concealed under the money bag. They tried again on June 18, but got

to the Van Dam too late because they had trouble obtaining an available rental van.

Prior to a third attempt on June 25, Holland and Moore obtained a driver's license from someone in an elevator in a Brooklyn building while Payton waited in the lobby. On June 25 Moore handled the van rental while Payton, who was late, took a cab to New York-New Jersey Freightways and got a ride to the scene with Holland. After Holland left the vicinity, Caccavalle arrived with money and Moore shot him three times as he kept reaching for his weapons. Moore jumped in the van with the canvas money bag and Payton drove off to the prearranged rendezvous spot, where Holland and Elliott were waiting.

Payton and Moore got in the back of Elliott's van while Holland got into his car. They split the money at Elliott's mother-in-law's house; Payton, Moore and Holland each took $10,000 and Elliott received $3,000. Moore and Payton changed clothes. Elliott held onto the money bag with the guns inside, which Holland was later supposed to throw into the Atlantic Ocean. Holland and Elliott left, but Holland returned a few hours later and drove Payton and Moore to Newark Airport. Payton and Moore flew back to Chicago.

B. Moore's Statements

Moore told the police that in May 1976 Holland asked him to come to New York to make some money. He arrived at Holland's with Richard Payton in June. Their intent was orginally "to take some furs," which they did, but which didn't prove to be lucrative. They then cased the Van Dam facility once or twice. In order to get identification with which to rent a van, "all four of us [the participants]" went to a building where Holland and Moore took identification from a man in an elevator.

On the morning of June 25, Moore went with someone else to rent a van. He used the identification previously obtained.

Holland, in his car, led Moore, in the rented van, to the Van Dam. Payton later joined Moore in the parked van and took over the driver's seat. Holland was not in the area while they waited for the man with the money. When Caccavalle arrived Moore got out of the van and approached him. Moore fired three times as Caccavalle continued to reach for his two weapons. Moore took the money bag and jumped in the van. Moore left the money bag and the guns for Elliott because Elliott was supposed to get rid of them. Moore went to the airport in the company of Holland and Payton and returned to Chicago. Moore did not thereafter speak with Holland, but he subsequently learned from Payton that the man he'd shot was a police officer.

The Prosecutor's Summation

During the State's summation the prosecutor often referred to codefendants' statements as proof of Holland's involvement in the events. He said that Holland, weapon in hand, told Thompson he would kill Thompson if Thompson didn't turn over his wallet, "as was testified by Caryl Thompson and as in the statement of Percy Moore and the statement of Claude Holland and the statements of Richard Payton." He remarked that Holland got Thompson's license, "and you don't have to take Caryl Thompson's viewpoint for it, you take the viewpoint of Arthur Elliott,[*] you can take the viewpoint of Percy Moore, and [**]. . . You take the viewpoint of Richard Payton. Read their statements." He pointed out that, though Holland himself denied participation in securing the identification, Payton and Moore said in their statements that Holland chose the building to be used for the driver's license robbery.

As proof that Holland was the mastermind of the plan, the prosecutor, three times, pointed to the evidence that Holland

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*Elliott gave no such testimony.

**At this point a defense objection was overruled.

called Moore and Payton to come to New York, a fact which was revealed only in the codefendant's statements. He indicated that the testimony of Moore, Payton and Elliott* showed that Holland drove Moore to rent the van and drove Payton to the Van Dam. He also noted repeatedly that there was testimony that Holland drove around the Van Dam location a number of times and that he was angry at Payton for being late, evidence which was contained only in Payton's and Moore's statements.**

At one point the prosecutor mentioned the fact that the tapes and transcripts in evidence couldn't be changed and that an independent expert, the court stenographer who took down Moore's and Payton's statements, had testified at trial. He then said, "Those statements are in evidence, and I ask you to consider them on the guilt of Percy Moore, the guilt of Payton, and Claude Holland with respect to each statement." Holland's attorney objected, apparently without response from the court.

The prosecutor also used Holland's codefendant's statements to support the credibility of other State witnesses, such as Caryl Thompson, Shirley Payton and Arthur Elliott. And finally, he appealed to the jurors "as citizens of this community" to "render a verdict of guilty because unlike these three defendants, he [George Caccavalle] was a citizen of this community."

The Charge, Verdict and Sentencing

In his instructions to the jury the trial judge cautioned the jurors not to consider statements, admissions or confessions made by one defendant on the issue of the guilt or innocence of any other defendant, and to disregard anything in the statements which may have named some other person as being involved.

The jury rendered guilty verdicts against all three defendants on the felony murder count. On December 14, 1977, Holland

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*Elliott did not so testify.

**The second time this evidence was discussed a defense objection was overruled.

and Moore were sentenced to maximum terms of 25 years to life, while Payton received a sentence of 20 years to life.

Post-Trial Proceedings

On direct appeal counsel for petitioner Holland argued that the introduction of the statements of codefendants Payton and Moore violated Holland's constitutional right of confrontation, as discussed in Bruton v. United States, 391 U.S. 123 (1968). The New York State Supreme Court, Appellate Division, Second Department, summarily affirmed on February 23, 1981, and leave to appeal to the New York Court of Appeals was denied on April 30, 1981.

Holland filed a habeas corpus petition in the United States District Court for the Southern District of New York, claiming that the introduction of inculpatory statements by Holland's nontestifying codefendants, the prosecutor's improper use of those statements, and the court's refusal to grant a severance or to redact incriminating portions of the statements violated Holland's constitutional right to confront and cross-examine his accusers.

On September 5, 1985, the Magistrate issued a Report and Recommendation, suggesting denial of the petition. The Magistrate concluded that there was a Bruton v. United States, 391 U.S. 123 (1968), error, but that it was harmless beyond a reasonable doubt. The District Court adopted the Magistrate's opinion. The Court of Appeals reversed and granted the writ, finding that the Bruton error was not harmless.

REASONS FOR DENYING THE WRIT

POINT I

THE INTRODUCTION AT A JOINT TRIAL OF THE TWO CO-DEFENDANTS' POST-ARREST CONFESSIONS IMPLICATING HOLLAND VIOLATED HIS RIGHT OF CONFRONTATION.

As the Magistrate, District Court and Court of Appeals have all found, the introduction of Moore's and Payton's confessions at their joint trial with Holland violated Holland's right of confrontation. Indeed, the Second Circuit expressly relied on this Court's recent decision in Lee v. Illinois, 54 U.S.L.W. 4555 (S.Ct. June 3, 1986) to find that the confessions were not interlocking.

The confessions of Payton and Moore diverge from Holland's statement on the crucial issue of Holland's involvement in the crime and his intent. Holland never admitted complicity in the commission of the robbery during which the murder occurred. From his admissions, a jury could have found (and the jury's questions here indicate that it probably did find) that Holland merely knew of the crime and aided his friends only after the robbery had been committed, and that he received his share of the profits for concealing the evidence. This does not amount to participation constituting aiding and abetting in the commission of the felony used as the basis for the felony murder conviction. See People v. LaBelle, 18 N.Y.2d 405, 412-13 (1966)(aider and abettor must share intent of principal actor; presence during rape and murder and assistance in disposing of victim's body not sufficient to prove defendant aided and abetted premeditated murder); People v. Clarke, 43 A.D.2d 834 (2d Dept. 1974)(knowledge of robbery resulting in felony murder, supplying gun to robber, and cutting robber's hair to help him avoid capture cannot support conviction for aiding and abetting robbery and only amounts to criminal facilitation or hindering prosecution); N.Y.P.L. §205.50 (McKinney 1975)(definition of crime of hindering prosecution).

As the Second Circuit observed, by contrast to Holland's admissions, the confessions of Moore and Payton both alleged that

> Holland was the mastermind, and had invited them to New York with the purpose of having them commit the robbery. Their damning testimony played a primary and essential role in making the case for aiding and abetting against Holland. This case is strikingly similar to Lee, in which the Court held that confessions cannot interlock when they diverge on matters as central as the defendants' various roles in the planning of the crime. See 54 U.S.L.W. at 4560. In remanding the defendant's conviction, the Lee Court stated that, whereas the defendant's confession alone would have rendered her liable for voluntary manslaughter, the admission of her co-defendant's statement added the element of premeditation and thus made out a case of murder. The Court held that Lee's trial had therefore violated the Sixth Amendment "[W]hen the discrepancies between the [supposedly interlocking] statements are not insignificant, the codefendant's confession may not be admitted." 54 U.S.L.W. at 4560; see United States v. Paternina-Vergara, 749 F.2d 993 (2d Cir. 1984).

Cert. Petition at 81a-82a.

Thus, the Court of Appeals applied the correct legal standard as expressed in Lee to the facts of this case. Under these circumstances, there is no legal issue meriting this Court's review.

POINT II

THE COURT OF APPEALS CORRECTLY FOUND THAT THE ERROR WAS NOT HARMLESS.

In finding that the error was not harmless, the Court of Appeals applied the standard recently reaffirmed by this Court in Delaware v. VanArsdall, 54 U.S.L.W. 4347, 4349 (S.Ct. April 7, 1986), in which the Court held that "harmless error" means "harmless beyond a reasonable doubt." The Second Circuit meticulously set forth the weaknesses in the State's case and gave great weight to the prosecutor's improper use of the co-defendant's confessions as evidence against Holland.* See Respondent's Petition at 83a-84a.

The Second Circuit analyzed the probable effect of the prosecutor's erroneous arguments upon the jury:

> We believe that the prosecution removed all doubt that the Bruton violation could be considered harmless when it belabored to the jury the "interlocking" nature of the confessions. In his summation, the prosecutor at great length surveyed the evidence supposedly showing Holland to be the "mastermind" of the crime, most of which derived exclusively from the statements of Moore and Payton. Over defense objections, the prosecutor often used Holland's co-defendants' statements to support the credibility of other witnesses such as Elliott and Thompson. And repeatedly in his summation, the prosecutor urged the jury to "[e]xamine these statements of Percy Moore and Richard Payton" as they tended to prove Holland's role in planning the Van Dam robbery. We have previously considered this kind of argumentation in a case involving the interlocking confessions exception to Bruton, and strongly cautioned the prosecution not to increase the possibility of prejudice by "disregard-[ing] the instructions and urg[ing] the jury to convict one defendant because his co-defendant has confessed." Kirksey v. Jones, 673 F.2d 58, 60 (2d Cir. 1982).

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*These improper summation arguments are not mentioned in the State's certiorari petition.

> The prosecutor's direct and indirect exhortations that the jury consider Moore's and Payton's statements against Holland magnified the dangers of permitting such statements in evidence at all; these dangers were doubly compounded in this case, which involved the factually overlapping confessions of two co-defendants. It strains our credibility to believe that, in the circumstances, the jury could fairly evaluate the defendants' differing versions of the Van Dam robbery, and accordingly we are unable to conclude that the Bruton error was harmless beyond a reasonable doubt -- the writ must be granted. See Van Arsdall, 54 U.S.L.W. at 4349-50; cf. Lee, supra, 54 U.S.L.W. at 4559 (noting that use of the interlocking confessions exception is particularly suspect where there is a strong likelihood that the factfinder considered a defendant's statement against his co-defendant).

Cert. Petition at 84a-85a.

In sum, the Court of Appeals applied settled principles of law to the facts of this case. Accordingly, there is no significant legal issue presented by the State's petition.

CONCLUSION

For the above stated reasons, the petition should be denied.

Respectfully submitted,

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